HIGH COURT OF CHHATTISGARH, BILASPUR

Division Bench: Hon'ble Shri Justice L.C. Bhadoo &
Hon'ble Shri Justice Sunil Kumar Sinha, JJ.

Criminal Appeal No. 385 of 2002

Chedin Bai Bareth

Versus

State of Chhattisgarh

JUDGMENT

Judgment for consideration

Sd/-
Sunil Kumar Sinha
Judge

Hon'ble Shri Justice L.C. Bhadoo, J

Sd/-
L.C.BHADOO
Judge

Post for Judgment: 1 /10/2007

Sd/-
SUNIL KUMAR SINHA
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 385 of 2002

APPELLANT — Chedin Bai Bareth, W/o Pappu @ Nashiruddin, Aged about 40 years, R/o Village- Rani Gaon Kalmetar, P.S. Ratanpur, presently R/o Jabdapara, Jailer Bageecha, Nanki Bai Ka Bada, Sarkanda, District - Bilaspur (C.G.)

Versus

RESPONDENT — State of Chhattisgarh, Through D.M. Bilaspur

(Appeal under Section 374 (2) of Cr.P.C.)

Appearance:

Shri K.K. Singh, counsel for the appellant.

Shri Ashish Shukla, Govt. Advocate for the State/ respondent.

(DIVISION BENCH)

HON'BLE SHRI L.C. BHADOO &
HON'BLE SHRI SUNIL KUMAR SINHA, JJ.

JUDGMENT
(01.10.2007)

Following judgment of the Court was delivered by

Sunil Kumar Sinha, J.

(1) Challenge is made to the judgment of conviction and order of sentence dated 9th March, 2002 passed by the Sessions Judge, Bilaspur in S.T. No. 31/2001, whereby, the said Court, after holding the accused/appellant guilty of offence punishable under Section 302 I.P.C. and sentenced her to undergo imprisonment for life.

(2) The brief facts are that the deceased namely Nashiruddin was husband of the accused Chedin Bai. They were residing in a rented premises of Nanki Bai (PW-4). The deceased Nashiruddin had married with the appellant Chedin Bai in *Chudi* form one year prior to the date of

incident. The allegation are that on account of certain dispute, on 25.11.2000, accused Chedin Bai poured kerosene oil over the body of the deceased and set him on fire. The deceased received burn injury to the extent of 85%. He was admitted to Dharam Hospital, Bilaspur on 26.11.2000. An intimation to this effect was given to the police station, based on which, the First Information Report (Ex.-P/17) was registered. The statement of the deceased under Section 161 Cr.P.C. (Ex.-P/20) was recorded. The site plan was prepared under Ex.-P/18. Another statement of the deceased was also recorded under Ex.-P/11.

(3) During the course of investigation, the deceased was requested to be medically examined under Ex.-P/6. He was examined by Dr. S.S. Bhatia (PW-5), who prepared his report under Ex.-P/6(A). According the medical examination of the deceased, there were deep burns on both arms of the deceased. There were many blisters. Skin was erased, his face, abdomen and both legs were superficially burnt. The body was burnt to the extent of 85%. The Doctor stated that he had admitted the deceased in hospital on 26.11.2000 and the description of the injury received by the deceased was also mentioned in the admission papers (Ex.-P/7). Looking to the serious condition of the deceased, the Investigating Officer made request for recording a dying declaration of the deceased vide his memo dated 26.11.2000 (Ex.-P/8[A]), on which, the dying declaration (Ex.-P/9) was recorded on 27.11.2000 at 8.45 a.m. by the Executive Magistrate, P.S. Toppo (PW-6).

(4) During the course of treatment, the deceased died in Dharam Hospital, Bilaspur on 29.11.2000 and his death was reported by the hospital authorities to the police under Ex.-P/19. After the death, the S.H.O. went to the District Hospital, Bilaspur gave notice (Ex.-P/14) to *Panchas* and prepared inquest on the body of the deceased under Ex.-P/3 and sent the body for post-mortem examination under Ex.-P/1. The post-mortem examination was conducted by Doctor T.S. Shyam (PW-1), who prepared his report under Ex.-P/1(A) and opined that the cause of death was septicemic shock due to burn injuries.

(5) After completion of usual investigation, the charge-sheet was filed in the Court of Judicial Magistrate, First Class, Bilaspur, who in turn committed the case to the Sessions Judge, Bilaspur, where the trial was conducted and the accused/appellant was convicted and sentenced as aforementioned.

(6) The conviction and sentence of the appellant is based upon the dying declaration (Ex.-P/9) recorded by the Executive Magistrate on 27.11.2000.

(7) Learned counsel for the appellant argued that the contents and recording of the dying declaration are suspicious, therefore, the conviction based upon such dying declaration cannot be sustained.

(8) We have heard the learned counsel for the appellant as well as the learned counsel for the State.

(9) So far as dying declaration is concerned, the law is that it is an exception to the general rule against hearsay evidence elaborated in Section 60 of the Evidence Act, 1872. The principle on which dying declaration is admitted in evidence is indicated in the legal maxim "*nemo moriturus praesumitur mentire* - a man will not meet his Maker with a lie in his mouth". Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence. The Apex Court said that though a dying declaration is entitled to great weight, it must be kept in mind that the accused has no power of cross-examination. Such a power is essential for eliciting the truth. This is the reason the courts also insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can

base its conviction without any further corroboration. The Apex Court further said that it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence [Pleas see *(2005) 9 SCC 113, Muthu Kutty and Another -Vs- State by Inspector of Police, T.N.*]

(10) If we examine the dying declaration on this line, it would appear that on 26.11.2000 itself looking to the burn injury of about 85%, sustained by the deceased, Doctor S.S. Bhatia (PW-5) had informed vide Ex.-P/8 that the Investigating Officer should arrange for recording of the dying declaration of the deceased. It is after this, on 26.11.2000 itself at about 8.00 p.m., the S.H.O. gave a requisition to the Executive Magistrate P.S. Toppo (PW-6) for recording the dying declaration. It appears that on the said requisition itself, at place 'A to A', a certificate has been given by Doctor that the deceased was in a position to give the statement. Thereafter, on 27.11.2000 at 8.45 a.m., the dying declaration of the deceased was recorded by P.S. Toppo (PW-6), Executive Masgistrate in District Hospital, Bilaspur.

(11) P.S. Toppo, Executive Magistrate (PW-6) has deposed that he had received the memo on 27.11.2000. After receiving such memo, he went to Burn Unit of District Hospital, where he met the hospital people but he had not met with the Doctor. At about 8.45 a.m., he had recorded the dying declaration of the deceased. He asked to the deceased about his name, on which, he told that his name is Nashiruddin and his father's name is Aminuddin and he is aged about 30 years and is muslim by caste. Thereafter, he asked to him as to how the incident took place, on which, the deceased replied that the incident is of 8.00 p.m. On the fateful night, he was sleeping in the house, his wife Chedin Bai poured kerosene oil on him and thereafter set him on fire. He also stated that his wife was having illicit relation with a boy, who used to reside near his house. He does not know the name of the boy. The Executive Magistrate has further deposed that thereafter he could not take the thumb impression

or signature of the deceased because his both the hands were burnt which he has endorsed in the dying declaration at place 'A to A' and after taking such declaration, he put his signature at place 'C to C'.

(12) Learned counsel for the appellant has argued that the certificate of the Doctor was given on 26.11.2000, whereas dying declaration was recorded on 27.11.2000, therefore, such certificate would not be useful to the prosecution and in absence of any prompt certificate regarding state of mind of the deceased, the credibility of the dying declaration is affected.

(13) This point is to be tested in light of Constitution Bench decision of the Apex Court rendered in a matter of ***Laxman -Vs- State of Maharashtra (2002) 6 SCC 710***. This was a reference made to the Apex Court in which a question has cropped up as to whether the certificate of Doctor to the effect that the patient is conscious and there was no certification that the patient was in fit state of mind at the time of making the declaration makes the declaration unacceptable and the subjective satisfaction of the Magistrate recording the dying declaration that injured was in a fit state of mind at the time of making declaration cannot be relied on, is the correct enunciation of law? The Apex Court after considering the entire matter held that normally, the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. The Apex Court further held that the dying declaration can be oral or in writing and adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. It has also been stated that there is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified

statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the Court ultimately holds the same to be voluntary and truthful. The Apex Court has further held that a certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise. The Apex Court replied the reference in terms that "In the absence of medical certification that the injured was in a fit state of mind at the time of making declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making declaration", is not correct enunciation of law.

(14) It is true that the certificate of the Doctor was given at 8.00 p.m. on 26.11.2000 and the dying declaration was recorded on 27.11.2000 and no fresh certificate was obtained on 27.11.2000 but merely on the basis of not taking certificate at the time of recording of the dying declaration, the dying declaration cannot be disbelieved. If a person taking a dying declaration was satisfied that the declarant was in fit state of mind to give the dying declaration, then, such declaration would be true and correct and reliance can be placed on such declaration. If we look into the evidence of P.S. Toppo (PW-6), not a single question has been asked by the defence regarding the deceased not being in a fit state of mind. It is only asked in the cross-examination that no certificate of the Doctor was obtained in Ex.-P/9 (dying declaration), which was admitted by him but he has added that there was a certificate on Ex.-P/8 i.e. certificate of an earlier date. Certainly, that certificate was not helpful to the prosecution. But in absence of any question regarding the Executive Magistrate being not satisfied about the mental condition of

the deceased to give a dying declaration and in view of the straightforward declaration given by the deceased, the argument about not taking the certificate and by itself the declaration becoming suspicious cannot be accepted. Moreover, in Para-5 of the cross-examination, the Executive Magistrate has denied that he had recorded the gist of the declaration. Rather, he said that different questions were not asked by him to the deceased but he had asked only one question to him. He has further stated that the deceased had continued to state and he had written the same. This conduct of the deceased shows that he was in fit mental condition and in normal manner, after being satisfied about the same, the Executive Magistrate had recorded the dying declaration of the deceased, which cannot be doubted on the above ground.

(15) So far as tutoring and false implication is concerned, this ground can also not be entertained. If the deceased would like to falsely implicate his wife making allegations that she had illicit relation with another person, he would have certainly implicated that person also, who was a paramour but no declaration has been made by the deceased against that person regarding his complicity in crime in question. Moreover, in earlier two statements also, which were recorded by the police on 26.11.2000 (Ex.-P/11) and 27.11.2000 (Ex-P/20), the deceased had stated to the police in similar fashion. This conduct shows that he has told the truth, which has happened in his house.

(16) In the facts and circumstances of the case, we take the dying declaration true and genuine and in appreciation, we find that the conviction based upon the dying declaration can well be sustained in the present facts and circumstances of the case.

(17) In the result, the appeal fails, it is liable to be dismissed and is accordingly dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
Sunil Kumar Sinha
Judge

vatti